

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-5043

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

In the Matter of

ALBERT W. DUMMOND, INC.

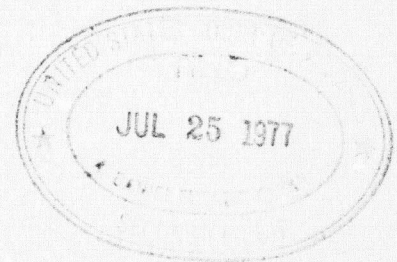
L. ROBERT LEISNER,

Co-counsel for the Trustee-Appellant

Docket No. 76-5043

Bankrupt

MOTION
FOR
REHEARING EN BANC



For Petitioner:

L. ROBERT LEISNER
2 Kimberly Street #c
Albany, N. Y. 12205

Request for Rehearing en banc

This is a petition for rehearing. The time to file a petition for rehearing was extended by order of the court.

The June 12, 1977 memorandum of affirmation says 2 things: (1, the court can reverse a determination of counsel fees only if there is an abuse of discretion; (2, we find no gross inequity.

Petitioner believes that controlling rules of law and equity have been overlooked. Petitioner requests a rehearing en banc,

Petitioner believes that the court must reverse where: (1. there are serious and extremely harmful errors of law; (2 there are gross inequities to the petitioner which have been overlooked. Petitioner will discuss the gross inequities first. It should be noted that there has never been any opposition to petitioner from any party, trustee, or attorney at any time.

I a

Rule of equity overlooked. a) Inequity of counsel subsidizing creditors. THOU SHALT NOT MUZZLE THE MOUTH OF THE OX THAT TREADS OUT THE CORN.

In the main there would be no estate with gross receipts of \$154,196.34 without the work of petitioner and his co-counsel.

Curiously the priority claims for wages of \$12,101.73, taxes of \$40,303.85 and secured payments of \$1,358.75 are all to be paid in full. The general creditors are to be paid \$54,782.61 or over a 28% dividend. Where \$154,196.34 was received into the estate, if petitioner's total requested fee were awarded the general creditors would still receive over a 21.46% dividend.

But petitioner, attorney Leisner is to receive nothing for his work extending over 8 years. Without even considering state and federal taxes (and these cannot be ignored by petitioner under the law), his overhead alone, (cost of work done) on 320 hours of work is over \$7,700.00 .

He is to be awarded \$5,500.00.

Petitioner is to have worked for nothing since 1966 and he is to have spent \$2,200.00 out of his own pocket to work for nothing.

Long ago it was written:

"This is my defence when they shall question me and examine me...."What soldier ever serves at his own expense?"And who of you have ever heard of a farmer who harvests his crop and doesn't have the right to eat some of it?.....
"What shepherd.....

The Roman citizen, Paul wrote further:

....."Say I these things as a man? or saith not the law also?

"For it is written in the law given to Moses, THOU SHALT NOT MUZZLE THE MOUTH OF THE OX THAT TREADETH OUT THE CORN."

"Was this law given simply for the sake of oxen?"

1 Corinthians c9, v3,v7,8,9; viz. Deuteronomy, c25v4;
1 Timothy c5v18

Petitioner respectfully reminds, bankruptcy stems from equity, and equity stems from the ancient chancellors, and bishops,-the consciences of kings, and judges, and from the ancient laws.

In the case of In re Seed Marketing Association 228 F. Supp. 812 (1964) the judge wrote:

"it is important to the creditors, the trustee, the bankrupt, the referee, and the public in general, that competent attorneys be attracted to do the work of attorney for the Trustee in bankruptcy. The Courts must recognize that these men must be adequately and fairly compensated if they are to be expected to lend their skill and talent to this area of law."

Chief Judge Lumbard, in In re Nazareth Fair Grounds and Farmers Market, Inc., 374 F2d 595 at 579 and 598 (2 Cir.) rejected totally the idea that a lawyer acting pursuant to court appointment in a bankruptcy must serve for nothing where there had been a total disallowance of the fee application. In the same case the lower court had said that if the services had been compensable they were not worth more than \$25,000.00 apart from \$249.63 for disbursements.

Chief Judge Lumbard writing for the Court said there must be a reasonable compensation for a single practitioner acting pursuant to appointment and a grossly insufficient \$25,000.00 evaluation must be remedied. In Nazareth supra, Attorney Rosen's disallowance was reversed, the \$25,000.00 evaluation was increased. Reasonable compensation was allowed Rosen in the sum of \$90,000.00 together with disbursements of \$249.63 for a total of \$90,249.63. In view of the nature and quality of Rosen's work, this appellate court regreted that the size of the estate precluded a more generous amount.

No lawyer acting pursuant to a court appointment should be compelled to work for nothing. Nor should he be compelled to subsidize creditors. He should receive compensation at a rate adequate for the support of himself and those dependent upon him. Nazareth Fair Grounds and Farmers Market Inc. (2 Cir. supra; In re Seed Marketing Assoc., supra; Straus v Victor Talking Machine, (2 Cir.) 297 F. 791 at 806 (2 Cir. 1924)

I (b) Rule of equity overlooked. "Thou shalt not have in thy bag divers weights." Thou shalt not have in thine house diverse measures a great and a small."

The Goldstein firm with 136 hours of work and a requested fee of \$8600. was awarded \$5500, perforce an hourly rate of \$40.44.

Attorney Leisner with 320 hours of work and a requested fee of \$18,500. was awarded \$5500, perforce an hourly rate of \$17.84.

Mr. Leisner's overhead (costs on work) was \$25.20, (N. Y. State Bar Jour. p.47 reports 42% overhead for N. Y. city law firms, 42% of \$60 = \$25.20 overhead) Mr. Leisner's normal billing rate in 1965 was \$60. an hour. A 175 line 62. The bankruptcy Court itself recognized \$25 an hour overhead. A-123, line 18. "I don't have any quarrel with the \$50, \$60, \$70 figures that Mr. Leisner's talking about." A-179, line 16.

On January 5, 1973, Bankruptcy Judge Beryl E. McGuire awarded \$96,000.00 counsel fees to the Hodgson, Russ, Andrews, Woods & Goodyear law firm for 1,854.1 hours of work on a \$110,000. fee, perforce \$51.77 an hour in the bankruptcy of Richardson Boat Co. #48704. (wage inquiries p.9, tax services p.25, 26 of the Hodgson firms' application in Richardson, all parallel Mr. Leisner's services.) The Hodgson firm it should be noted was the M & T banks' law firm with the same Hodgson^{partner} opposing the action by Mr. Leisner against the preferential mortgage transfer to the bank.

In Surface Transit Inc. v. Sax Bacon & O'Shea 266 F2d 862, (2nd Cir.), where differing amounts of work were done, differing amounts had to be awarded co-counsel, \$135,000 to Mr. Garlock; \$10,000 to the Hays firm; and \$2,500 to the estate of Mr. Lennox.

Snell v. Frank Snell Sawmill Co. D C Ga. 271 F 696, aff'd 284 Fed. 847, cert. den. 261. U. S. 619 holds that where a number

of attorneys are associated they are entitled to a reasonable fee for all of them and one of them cannot by accepting from the client less than a reasonable fee, deprive the other attorneys of such a fee.

Thus several equitable rules and conclusions follow. (a) Where the total legal fee is inadequate, the acceptance of \$5500 by the Goldstein firm cannot justify an inadequate award to Mr. Leisner and it cannot deprive him of an adequate fee. (b) A \$5500 award to the Goldstein firm for 136 hours of work and an award for the same amount \$5500 to Attorney Leisner for 320 hours of work shows a grossly inadequate award for Mr. Leisner. (c) Moreover the inequity is even greater where the awards to the law firms covered the services of juniors and associates as well as partners. Where a blended hourly rate of \$51.77 was awarded juniors, associates and partners of the law firm opposing Mr. Leisner, that award having been given in the Richardson case, and the Goldstein firm is awarded a blended hourly rate of \$40.44 in this case for the work of juniors, associates and partners, the award to Mr. Leisner is grossly insufficient.

Mr. Leisner, a single practitioner is a lawyer of well over 20 years of experience and has acted as counsel in major capital and major tax cases. The blended hourly rates of \$51.77 and of \$40.44 to cover the work of juniors and associates in the large firms, supports a \$60 or \$70 hourly rate in the case of Mr. Leisner. Those blended rates, actually awarded to the firms, confirm the Bankruptcy Judge's statement, "I don't have any quarel with the \$50, \$60, \$70 figures that Mr. Leisner's talking about." A-179, line 16.

Attorney Leisner charged \$60 an hour in 1965 and his hourly rates were going higher in the later part of the 1960's. (A-175)

The \$60 normal hourly rate applied to the 320 hours worked is \$19,200.00. This would be the attorney's normal fee.

"Thou shalt not have in thy bag divers weights, a great and a small. Thou shalt not have in thine house divers measures, a great and a small. But use a true and just weight, a perfect and just measure that you may have a long life".....etc. Deuteronomy c 25, v. 13, 14, 15.

"The value of an attorney's time generally is reflected in his normal billing rate." Lindy Bros. Bldrs. of Phila. v Am. Rad & S 487 F2d 161 at 167.

II

LEGAL ERRORS "You shall pay the laborer his wages, since he is poor and looks forward to them." Deut.c24v10; Payment is virtually assured the Court appointed lawyer. Hudson & Manhattan R.R. 339 F2d 114, 115 (2 Cir. 1964) Where substantial, beneficial and valuable services are performed by an appointed lawyer who relies upon those services for his livelihood, to erroneously ignore or dismiss those services is a serious and extremely harmful error of law. This is a very bad thing for the bankruptcy court or any court.

A. TAX SERVICES The beneficial substantial, and valuable State and Federal tax work on \$85,000.00 of rents and interest was ignored or dismissed. The Hodgson firm in the Richardson case was allowed \$51.77 an hour for doing such work by the same bankruptcy Judge.

In 1948 Bercu who was doing such work was prosecuted for doing lawyer's work; and he regularly charged \$50 an hour for such work almost 30 years ago. The Bercu case is worth reading as a landmark case on the work of a tax lawyer. Petitioner who has spent a great deal of his life as a tax lawyer for the U. S. gov't, for private clients and for the State of New York as a presiding officer for formal tax hearings, does not understand how Bercu could be prosecuted for practicing law and petitioner a tax lawyer could have his services ignored and dismissed. Matter of N. Y. County Lawyers Ass'n, Bercu 273 App. Div. at 535, aff'd 299 N. Y. 728, 87 N. E. 2d 451; Matter of N. Y. County Lawyers Ass'n v. Standard Tax & Management Corp. 181 Misc. 632.

B. SERVICES ON RENTALS AND RENTAL PROPERTIES The lengthy and substantial work on the lease cancellation, the eviction, the difficult rental collections, the cancellation of the purchase and renewal options was ignored or dismissed as not constituting legal services. This was legal error. In re Wenger, 61 N. Y. S. 2d 686, 156 Misc. 966; Finnox Realty Corp. v. Lippman, 163 Misc. 870.

Such work has been brought to lawyers for centuries as persons worthy of trust and knowledgeable in property law and rights. c.f. U. S. v Fornes, 125 F2d 928 at 932 to 942, (2 Cir.1942), containing an extensive legal history of leases, cancellations and dispossess actions.

If non lawyers are prosecuted for practicing law for doing this work, and their work products are fatal bars to court action, Wenger, supra, and Finnox Realty Corp., certainly the court should compensate a lawyer where this work has helped to make the bankruptcy successful.

Here the lawyer worked hard to bring much or the \$62,378.47 of rents into the estate, and to keep the property in the possession of the trustee, so that rents would continue, and he fought to have the trustee retain the rents against the M & T banks vigorous and powerful claims to all of the rents.

C. SERVICES ON LEGAL CORRESPONDENCE It was error for the bankruptcy court to refuse to compensate Attorney Leisner and to berate him for his work on correspondence and for keeping a record of such work. The bankruptcy court seems to imply that only court work, or work on pleadings and court papers or other formal legal instruments is compensable, or that other work doesn't count.

But this work did make the bankruptcy successful, it was necessary and it was drudging work as is much law work, and it was compensable.

In re Nazareth Fair Grounds and Farmers' Market 374 F2d 595 at 598 (2 Cir. 1967), reiterates the rule that an attorney acting by court appointment and expecting to be paid from the estate is under a duty to keep accurate daily records so far as possible. The court said it was not always an easy matter for single practitioners or small offices and they are "almost never able to keep track of a multitude of small matters such as telephone calls and the sending and receipt of letters." The Court said that the failure to keep complete records will not result in a total disallowance, but it will be a factor in evaluating services and accepting later estimates of work.

Eugene Gearhart, in the N. Y. State Bar Journal quotes:

"A letter may take fifteen minutes or an hour of the lawyers time to dictate, check and sign to say nothing of the time used in assembling the information necessary for writing the letter."-Merrill, Gearhart, N. Y. S. Bar J., Vol 44 p.458.

Judge McMahon, SDNY writes:

"For every hour spent by a lawyer at least another hour is spent by clerical help. This is rather obvious when we think of the lawyer dictating a letter to a stenographer who must spend time as she takes dictation, transcribes her notes and mails the letter. " - Paolillo v American Export Isbrandtsen Lines, 305 F. Supp. 250 at 253 (SDNY) 1969.

Where this higher court has said the lawyer is under a duty to keep track of the small matters, the phone calls and the sending and receipt of letters as well as he can do so, it is very bad and wrong to belittle the lawyer for doing so. In re Nazareth Fair Grounds and Farmers Market, opinion per Ch. J. Lombard

Where these multitudes of little things have made the bankruptcy highly successful, it is wrong to refuse to compensate the lawyer, and it is wrong to compel him to subsidize the creditors.

D. LEGAL SERVICES ON ENTANGLEMENTS ETC Here the attorney did much work on tangled labor claims, State Labor Dept. officials inquiries, union welfare benefits, matters relating to other contractors, tangled insurance coverage, property assessments and taxes, backcharges and counterclaims.

Legal services such as dealing with union officials, taxation matters, recoveries from defaulting tenants, and elimination of labor claims were allowed to Henry S. Hooker in the case of In re Equitable Office Bldg. Corp. 83 F. Supp. 531, S.D.N.Y. (1949) aff'd 174 F2d 827 rev'd on other grounds 175 F2d 218.

It was error to refuse or to fail to recognize such work. Petitioner is entitled to compensation for his work on 1) Tax Services, 2) Services on Rentals and the Rental properties, 3) Correspondence on the Bankrupt's matters, 4) Work on legal entanglements.

III

The total legal fee awarded and in particular the fee of the petitioner were grossly inadequate, and inequitable.

The ox at the grinding wheel is given more justice than the lawyers in this case. It is submitted that the court must allow the attorneys a reasonable fee.

Amounts involved

A reasonable
legal fee

\$35,379.67	receipts from disputed claims, accts. receivable, with liens, lawsuits, back-charges, and counterclaims, jobs over statewide area.	\$9000.
\$24,454.88	cash paid by the M & T bank as part of overall settlement of hotly disputed suit to avoid preferential mortgage transfer	\$8500.
\$62,378.47	Rentals in controversy (a) Suit was first brought to avoid the leases in the Federal Court, this was deferred, (b) rents from Coder services were constantly in need of an attorney's attention, finally (c) a dispossess action was brought in the State Courts, rents were brought current only after a full trial, which resulted in a stipulation cancelling lease purchase and renewal options. While all this was going on, (d) there was a counterclaim by the M & T in the bankrupt's action to set aside a mortgage preference; this counterclaim was for all of the rentals, a demand for a full accounting of the rents, a demand for appointment of a receiver, and a demand for payment of all property taxes and insurance. (e) during the pendency of this action, the M & T signed an indemnification agreement to save the trustee harmless if the trustee paid taxes and ins. (f) petitioner worked out the resolution of the tangled insurance and back taxes and assessments to the property. (the indemnification agreement saved the trustee harmless and indemnified him if the M & T prevailed on the mortgage action.) (g) At the end the M & T paid over the \$24,454.88 cash above, gave up its claim to the \$62,378.47 rentals, and waived its claim to a \$51,870.93 deficiency judgement filed in the Erie Co Clerk's office.	\$9000.

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\$26,500.

Amount involved

A reasonable
legal fee

\$22,496.07 Interest was derived from the above funds
obtained by the attorneys' work

Tax work on
\$84,965.54 7 years
state &
federal
for bkpt.
corp.

The rentals of \$62,378.47 and interest,
of \$22,496.07 gave a total of \$84,965.54
rents & interest, requiring tax work.
Attorney Leisner did the tax work, re-
search, determined the amount of the
losses, prepared the returns, obtain-
-ed the documentation for the losses,
and filed N. Y. State and U. S. income
tax returns for the years 1967, 1968,
1969, 1970, 1971, 1972, and 1973.
In 1970 he requested early Federal
audits on March 20 for the years,
1967, 1968, and 1969. The returns
were examined and audited and all
information, documents and legal
basis were furnished, with a March 26,
1971 report of no change on returns
with no tax for 1967, 1968 and 1969.
A Nov. 30, 1974 request for early audit
resulted in a March 7, 1975 report of
no change on returns with no tax for the
years 1971, 1972 and 1973. No tax on
all income for all years.

\$4,200.00

A reasonable legal fee for all the lawyers and firms - \$30,700.

From the above it is evident that to award \$5500 to the
Goldstein firm for 136 hours of work, \$5500 to attorney Leisner
the petitioner, for 320 hours of work and \$3000 to the Swerdloff
estate does not do equity and further it does not adequately
compensate for the legal work.

Although the bankruptcy has received \$154,196.34 petitioner
has not received one cent thus far.

Petitioner cannot work for nothing, subsidize creditors,
and be taxed costs when he requests a reasonable and normal fee.
There has never been any opposition to petitioner by any creditor,
party, trustee, or attorney. Excessive stripes by judges, bring
disgrace upon the kinsmen of judges. Deut. c 25.

Therefor petitioner appeals to this court for relief.

In conclusion

DUTIES IGNORED OR OVERLOOKED

(1) Where \$154,196.85 was received into the bankruptcy estate, the bankruptcy court was under a duty to award attorney Leisner a legal fee at a rate which was consonant with a living wage for the legal work done. Straus (2 Cir.) infra

(2) The bankruptcy court was under a duty to consider what would be left to the attorney after Federal and State income taxes. U.S. v 115.128 Acres N. J. 101 F. Supp. 790

(3) The bankruptcy court was under a duty to consider the rising rentals and employees compensation, the rising law office expenses which must be paid before determining what the attorney really earned for the support of himself and those dependent upon him. Straus v Victor Talking Machine Co. 297 F. 806 (2 Cir.); Hammer v Tuffy 145 F2d 447 at 451 (2 Cir.)

The bankruptcy court failed in its duty to this attorney, the petitioner. He did not receive a living wage. Moreover he is forced to subsidize creditors.

A SHAME TO JUSTICE

Attorney Leisner appeared before this circuit on the DeFlumer cases 380 F2d 1019 (2 Cir.) and throughout the many cases and proceedings of DeFlumer chronicled therein; and these span many years. He also brought the appeal in Stephanie Bauer v. Foley, Dist. Dir. & U. S., 404 F2d 1215; rehearing 408 F2d 1331. (2 Cir.)

In this very court the burdens were very heavy in the pauper's cases of DeFlumer, convicted of murder and sentenced to life at the age of 14, and Stephanie Bauer, the innocent spouse driven out of her home by false tax returns and invalid government liens and seizures.

The judges of this circuit on those panels would have perhaps knowledge of attorney Leisner and his work. But probably in this day of massive court calendars, no judge can note or long remember cases, muchless lawyers.

However the nature and extent of those cases as reported, would in themselves attest to the great personal and financial burdens carried out by the petitioner in the Federal system for equal justice to all.

It would be a shame to justice, where this attorney has carried such fearful burdens in the State and Federal systems and in this very court, if he were now to receive nothing for his labors since 1966 and to be forced to subsidize creditors where this estate has received \$154,196.85.

Costs on an unmerited finding of frivolousness are without a basis and are refuted by the record and particularly by the statement of Chester Pearlman, Past President of the Erie County Bar Association (Exhibit 5) and by the representation of William R. Brennan, also a Past President of the Erie County Bar Association.

A LIVING WAGE

"The laborer deserves his living." Matt. c 10 v.9; Luke, c.10, v7; Tim. c5,v17; Deut. c24,v14.

The petitioner respectfully requests this court to consider,

(1) that a lawyer is entitled to a rate of compensation commensurate with a living wage for the support of himself and those dependent upon him. Straus v Victor Talking Machine Co. (2 Cir.). supra;

(2) that in determining compensation, what a lawyer truly earned for the support of himself and those dependent upon him that a.)overhead, b.)inflation, c.)taxes, must be considered. Straus (2 Cir.). supra; In re Plimpton's Estate, 186 N. Y. S. 257; and, U.S. v 115.128 acres of Land etc, 101 F. Supp. 796. (taxes); Hammer v. Tuffy (2.Cir.) supra

There has never been any opposition to petitioner by any party, creditor, the trustee, or any attorney.

Petitioner respectfully prays for a rehearing en banc, and for relief, that the order of the lower court be modified, that he be awarded \$18,500. plus \$317.35 disbursements, for his services with costs.

Respectfully Submitted,

L. Robert Leisner

L. Robert Leisner

Attorney petitioner appellant

2 Kimberly St. #c
Albany, N. Y. 12205

PROOF OF SERVICE BY MAIL

On July 21 1977,

I mailed a true conv of the within Motion for Reopening the Case securely enclosed in a postpaid wrapper in the post office at Albany, New York regularly maintained by the United States Government directed to:

DAVID GOLDSTEIN, Co-Counsel, 10 Lafayette Sq., Buffalo, N. Y. 14203

LOUIS STERNBERG, Trustee, 500 Walbridge Bldg., Buffalo, N. Y. 14202

~~EDWARD~~ KAVINOKY, ^{Cook firm} for (J. SWERDLOFF Estate Attv.) 120 Delaware Ave.
Buffalo, N. Y. 14202

those being their designated and actual offices and addresses,
between which places there is regular communication by mail.

L. Robert Lerner

